United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,494

434

BLONDINE C. HOLLAND HUGHES,

Appellant,

v.

CLARA B. HOLLAND,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BELFORD V. LAWSON, JR.
ARNOLD A. STAHL

Suite 701—RCA Building
1725 K Street, N.W.
Washington 6, D.C.

Attorneys for Appellant

STATEMENT OF QUESTIONS PRESENTED

The question is whether the District Court Judge, in a case where title to realty is in dispute and fraud and misrepresentation are alleged as the basis of the Complaint, did not abuse his discretion and err in denying Appellant's Motion to Set Aside Entry of Default and To Vacate the Judgment Thereon setting aside the deed to the realty involved, where said motion was timely filed, and where the Appellant's verified affidavit and answer accompanying said motion set up matters justifying a grant of said motion and raising a meritorious defense to the Complaint.

INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES INVOLVED	3
STATEMENT OF POINTS	4
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. Where a Defaulting Party Timely Files a Motion To Set Aside Entry of Default and To Vacate the Judgment Thereon Showing by Verified Affidavit and Answer that Said Party Was Not Guilty of Neglect, Wilful or Otherwise, in Failing to Answer and Defend, and Showing Further a Meritorious Defense Refuting Allegations of Fraud and Misrepresentation, and Opposing Party's Substantive Rights Would Not be Prejudiced Thereby, the Court Should Resolve All Doubts in Favor of a Trial on the Merits and Grant such Motion	5
II. Disputed Questions as to Title of Realty Require Hearing Upon the Merits Between the Parties	9
III. Where Title is Regular on Its Face and of Record, Disputant is Estopped to Deny Matters Relevant to Transfer	10
CONCLUSION	10
EXHIBIT 1 -- Appellant's Affidavit dated March 15, 1963	A-1

TABLE OF CASES

Askew v. Randolph Carney Co., 119 A. 2d 116	8
Cockrell v. Fillah, 1931, 60 App. D.C. 210, 50 F. 2d 500	5
Collins v. Streitz, C.C.A. Ariz., 95 F. 2d 430, Certiorari denied 59 S. Ct. 67, 305 U.S. 608, 83 L. Ed. 387	9
Durling v. Markum, C.A. 7th, 1956, 231 F. 2d 833, Certiorari denied 77 S. Ct. 96, 98, 362 U.S. 870, 1 L. Ed. 2nd 76, 77	5, 6

	Page
* Etty v. Middleton, 1948, 62 A. 2d 371	6
* Gee How Oak Tin Ass'n of District of Columbia v. Potomac Chemical Corp., 1955, 110 A. 2d 86	8
* General Telephone Corporation v. General Telephone Answering Service, et al., C.A. 5th 277 F. 2d 919	8
* Huntington Cab Co. v. American Fidelity & Casualty Co., D.C. W. Va., 1945, 4 F.R.D. 496, 498	6
* Italia Societa Anonima Di Navigazione (Italian Line) v. Cavalieri, 1953, 99 A. 2d 488	7, 8
McClosky & Co. v. Eckart, CCA 5th, 1947, 164 F. 2d 257	5
Morris v. Wheat, 1896, 8 App. D.C. 379	10
Pailke v. Pailke, 247 P. 2d 838, 113 Cal. App. 2d 53	9
Standard Grate Bar Co. v. Defense Plant Corporation, D.C. Pa., 1944, 3 F.R.D. 371	6
* State of Missouri v. Fidelity & Casualty Co., D.C. Mo., 107 F. 2d 343, 346	6
Tozer v. Charles A. Krause Mill Co., CA 3d 1951, 189 F. 2d 242	6
U. S. for Use of Kantor Bros. v. Mutual Const. Corporation, D.C. Pa. 1943, 3 F.R.D. 227	6
Williams v. Robinson, 35 A. 2d 547, 183 Md. 117	9
Woods v. Severson, D.C. Neb., 1949, 9 F.R.D. 84	6

---

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,494

BLONDINE C. HOLLAND HUGHES,

Appellant,

v.

CLARA B. HOLLAND,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an Order of the United States District Court for the District of Columbia denying Appellant's Motion to Set Aside Entry of Default and to Vacate the Judgment Thereon, entered on November 15, 1962 (JA 12). Notice of Appeal was filed November 16, 1962 (JA 13). The aforesaid motion was filed pursuant to the Rules of Court of the Court below, and pursuant to 28 U.S.C.A., F. R. C. P. 55(c) and

60(b). Original jurisdiction below was founded upon Title 12, Section 401, District of Columbia Code, 1951 edition, and upon the amount in controversy exceeding three thousand ($3,000.00) dollars (JA 1).

STATEMENT OF THE CASE

Appellant and Appellee are daughter and mother, respectively (JA 2). In June 1959, Appellant graduated from District of Columbia Teachers College. As a graduation gift to Appellant, the Appellee, on July 23, 1959, in the presence of Appellant and a Notary Public for the District of Columbia, and upon oath, deeded and conveyed to Appellant all rights and title to Lot 148, Square 2989, known as 814 Missouri Avenue, Northwest, in the District of Columbia (JA 1, 2, 11 and 12). The deed was duly recorded, pursuant to the laws of the District of Columbia, by the Recorder of Deeds in Liber 11,346 at Folio 338, on November 27, 1959 (JA 2).

Appellee continued to reside at the above address until January 17, 1962 (JA 5), when she moved to another address. On August 3, 1962, the Appellee, by counsel, filed a "Complaint to Set Aside Deed Procured by Fraud and Misrepresentation and for An Accounting and Damages" in the United States District Court for the District of Columbia (JA 1). Appellant was personally served on August 6, 1962, at which time she retained counsel to answer and defend said cause (JA 9). Shortly thereafter, Appellant's counsel ceased to privately practice law, closed his office, took a position as a government employee (JA 9), and although an attempt on his part to substitute counsel was made, it was never perfected and said counsel, either through mistake, inadvertence, surprise, excusable neglect, or other reason, misplaced the citation served upon Appellant and failed to answer and defend said cause. Appellant was not aware of this nor did she know of the default entered (JA 10) until October 10, 1962, when she received notice that a hearing on default in the matter was set for October 16, 1962 (JA 10). At this

time, Appellant was pregnant, separated from her husband, depressed and possessed of meager resources (JA 10).

Notwithstanding the foregoing, Appellant retained a second attorney who asked for a continuance of the hearing which was granted to October 18, 1962. Appellant was advised by said counsel that it was not necessary to attend said hearing although she was fully prepared, if permitted, to give testimony in her behalf refuting all matters set forth by Appellee in the Complaint (see Appellant's Exhibit 1).

The hearing on default occurred on October 18, 1962 (JA 3), and on October 19, 1962, the Court below entered its Judgment and Order Setting Aside Deed (JA 7). On October 31, 1962, Appellant filed a Motion To Set Aside Entry of Default and To Vacate the Judgment Thereon with a verified affidavit and an Answer to the original Complaint appended thereto (JA 8, 9, and 11). On November 15, 1962, the Court below, without hearing thereon, or reasons given, denied the aforesaid motion (JA 12).

Notice of Appeal was filed on November 16, 1962, and on January 18, 1963, present counsel entered their appearance for Appellant to prosecute this appeal.

STATUTES INVOLVED

28 U.S.C.A., Federal Rules of Civil Procedure, Rule 55(c):

> (c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

28 U.S.C.A., Federal Rules of Civil Procedure, Rule 60(b):

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (i) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment. * * *

STATEMENT OF POINTS

1. Where a defaulting party timely files a motion to Set Aside Entry of Default and to Vacate the Judgment Thereon showing by verified affidavit and answer that said party was not guilty of neglect, wilful or otherwise, in failing to answer and defend, and showing further a meritorious defense refuting allegations of fraud and misrepresentation, and opposing party's substantive rights would not be prejudiced thereby, the Court should resolve doubts in favor of a trial on the merits and grant such motion.

2. Disputed questions as to title of realty require hearing upon the merits between the parties.

3. When title is regular on its face and of record, disputant is estopped to deny matters relevant to transfer.

SUMMARY OF ARGUMENT

The Appellant complains of the Order made by the District Court Judge denying Appellant's motion to Set Aside Entry of Default and to Vacate the Judgment Thereon.

The fundamental basis for this appeal is that the District Court Judge abused his discretionary powers and erred in denying the aforesaid motion. No hearing was held on said motion. The abuse is clearly demonstrated because (a) the Appellant's verified affidavit and answer appended to the motion in question showed that her default was not wilful and was not due to her neglect but that of her former counsel. These pleadings showed further that as soon as Appellant was notified of the default she took immediate steps to attempt to cure the default by every legal means open to her. (b) Appellant's verified affidavit and answer brought to the attention of the Court the Appellant's contentions that the deed in question was validly executed and recorded, given for full and fair consideration, executed in the presence of Appellant and a Notary

Public by Appellee who was fully experienced in such matters having conveyed several pieces of property in the recent past. All of these matters raised meritorious defenses to Appellee's original complaint, placing in issue the serious charges of fraud and misrepresentation as to the title of the realty involved as alleged by Appellee, and perforce demanding a trial on the merits. (c) The Court's order flies in the face of the great majority of cases and the weight of traditional and equitable interpretations delving into the philosophy of Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure, which favor a liberal interpretation thereof and a trial on the merits wherever possible in the interests of substantial justice.

Appellant merely asks for her day in Court denied to her not by her own fault or lack of diligence, but that of others, so that she may prove by a preponderance of evidence the justness of her cause.

Appellant, therefore, says the District Court Judge abused his discretionary powers and erred in denying out of hand Appellant's Motion to Set Aside Entry of Default and To Vacate The Judgment Thereon.

ARGUMENT

1. **Where a defaulting party timely files a motion to Set Aside Entry of Default and To Vacate the Judgment Thereon showing by verified affidavit and answer that said party was not guilty of neglect, wilful or otherwise, in failing to answer and defend, and showing further a meritorious defense refuting allegations of fraud and misrepresentation, and opposing party's substantive rights would not be prejudiced thereby, the Court should resolve all doubts in favor of a trial on the merits and grant such motion.**

It is settled law that a motion to set aside an entry of default or a judgment by default is addressed to the sound discretion of court. Cockrell v. Fillah, 1931, 60 App. D.C. 210, 50 F. 2d 500; McClosky & Co. v. Eckart, C.C.A. 5th, 1947, 164 F.2d 257; Durling v. Markum,

C.A. 7th, 1956, 231 F. 2d 833, certiorari denied 77 S.Ct. 96, 98, 352 U.S. 870, 1 L.Ed. 2d 76, 77. The fundamental policy of law inherent in 28 U.S.C.A., Federal Rules of Civil Procedure, Rules 55(c) and 60(b) is to bring about a trial on the merits and have every case litigated whenever possible- Etty v. Middleton, 1948, 62 A.2d 371. Hence, the trend of the cases is towards disfavoring judgments by default and any doubts should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits. State of Missouri v. Fidelity & Casualty Co., D.C. Mo., 107 F.2d 343, 346; Huntington Cab Co. v. American Fidelity & Casualty Co., D.C. W.Va., 1945, 4 F.R.D. 496, 498.

Appellant recognizes that the Court should not reopen a default judgment merely because the party in default requests it, but should require the party to show that there was good reason for the default and that said party has a meritorious defense to the action. Tozer v. Charles A. Krause Mill Co., C.A. 3d, 1951, 189 F.2d 242.

Appellant's verified affidavit and answer (JA 9 and 11) showed that without her knowledge, her counsel had "closed shop" so to speak and accepted a position with the United States Government. This occurred within a two-week period (JA 9), and amidst the events of change, Appellant's opportunity to be heard went by default. Such default was by no means due to her neglect, inadvertence or inaction, but to the mistake, inadvertence and excusable neglect of her counsel. It would seem only just and proper that if a default judgment may be vacated due to a misunderstanding as to appearance and representation by counsel, Standard Grate Bar Co. v. Defense Plant Corporation, D.C. Pa., 1944, 3 F.R.D. 371, or where the default was suffered through neglect of counsel preoccupied with other litigation, U.S. for Use of Kantor Bros. v. Mutual Const. Corporation, D.C. Pa. 1943, 3 F.R.D. 227, or even the mistake or excusable neglect of a party not represented by counsel, Woods v. Severson, D.C. Neb., 1949, 9 F.R.D. 84, that the

standards of Rules 55(c) and 60(b) would be satisfied and judgment by default vacated where counsel is leaving the private practice of law, closing his office, placing himself in a position where he cannot aid his client and erring through common mistake and inadvertence in failing to answer and defend in behalf of said client.

Appellant's good faith and diligence are demonstrated by the fact that as soon as the default became known to her, she retained new counsel to "carry the ball." Where defaulting party is not guilty of wilful neglect and acts with reasonable diligence after entry of default, sound judicial discretion requires that the default be set aside, if there is a prima facie showing of a meritorious defense and opposing party's substantive rights will not be prejudiced thereby. Italia Societa Anonima Di Navigazione (Italian Line) v. Cavalieri, 1953, 99 A.2d 488.

Appellant's argument is further strengthened when we look to the meritorious nature of the defense set up in the verified answer appended to the motion in question (JA 11). Appellee makes sweeping charges of fraud, misrepresentation and trick. Yet the facts and the record show a validly executed and delivered deed, regular on its face, duly recorded, and conveyed for full and fair consideration (JA 9-12). The record further shows that Appellee acquiesced in said conveyance and lived with Appellant for almost three years subsequent to the conveyance (JA 5). Furthermore, the record shows that contrary to the allegations of Appellee, Appellant made all payments on the mortgage except during the summer months when Appellant was not teaching school and hence had little or no income (JA 6, 12 and Appellant's Exhibit 1). Appellee was not, as alleged, inexperienced. On the contrary, Appellant's verified answer demonstrated that Appellee was quite familiar with instruments of conveyance and knew perfectly well the nature of her act in conveying the deed (JA 11-12). It is interesting to note that during the hearing on default, not one word of testimony offered by Appellee had any bearing on the allegations of fraud and misrepresentation (JA 3-7).

The Court below had the foregoing facts before it, yet it still did not hold a hearing on the subject motion. Furthermore, the pleadings referred to not only set up a reasonable and compelling excuse for default, but raised issues as to many basic defenses in the law of Real Property as to title, consideration, estoppel (all discussed infra), all of which demanded a trial on the merits to ascertain the truth of the matter.

In General Telephone Corporation v. General Telephone Answering Service, et al, C.A. 5th, 277 F.2d 919, where an order granting a motion to vacate judgment by default was appealed, the Court spoke well on this subject at page 921:

> "All that the order, of which appellant so bitterly complains, has done is to give the defendants their day in court. If, as appellant so vigorously insists, the defendants were and are guilty of unfair competition, in short are not the sinned against but the sinners, the setting aside of the default will not prevent plaintiff's making its proof and obtaining the decree to which it is entitled * * *."

It has been held that a slight abuse of discretion in refusing to set aside a judgment which is not on the merits is sufficient to justify a reversal. Gee How Oak Tin Ass'n of the District of Columbia v. Potomac Chemicals Corp., 1955, 110 A.2d 86. There is more than a slight abuse of discretion in the instant case. Since the rule permitting relief from default judgments should be liberally construed, Italia Societa case, supra, and Askew v. Randolph Carney Co., 119 A.2d 116, and since the interests of justice are best served by a trial on the merits, Appellant contends that the Court below, in light of the foregoing, applied a standard of strictness instead of liberality in concluding that justice did not require that the judgment be set aside.

2. Disputed questions as to title of realty require hearing upon the merits between the parties.

The facts set forth in Appellant's verified answer attached to the motion in question here clearly place into issue the question of title to the realty herein involved by affirmatively setting up title in Appellant. It is a universal rule that as between the parties, their heirs or privies, a deed is good without consideration. Collins v. Streitz, C.C.A. Ariz., 95 F.2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387. It is also universally accepted that a deed or conveyance will be supported by a consideration of natural love and affection. Williams v. Robinson, 36 A.2d 547, 183 Md. 117; Pailke v. Pailke, 247 P.2d 838, 113 Cal. App. 2d 53.

In the instant case, on June 23, 1959, after her daughter had achieved Appellee's hopeful expectations by graduating from District of Columbia Teachers College, Appellee gave the Appellant a deed to Lot 148, Square 2989, known as 814 Missouri Avenue, Northwest, in the District of Columbia. The house situated on this property was the residence of Appellant and Appellee, and remained as the residence of Appellant. The execution of the deed was performed by the Appellee in the presence of Appellant and a Notary Public (JA 1) and was duly recorded by the Recorder of Deeds of the City in Liber 11346 at Folio 338, in November of 1959. Appellee raised her right hand and took an oath as to the act of conveyance. Subsequent to this, Appellee represented to others that Appellant was the owner of the house (see Appellant's Exhibit 1). There is little more one can do to place in issue the title to realty.

It is submitted that we have here a mother and daughter, both of whom are alert, intelligent and in full possession of their faculties. A deed was given by the former to the latter out of natural love and affection. For some reason, obviously personal between the two, the mother, three years later files suit against her daughter to have the aforementioned

deed set aside and setting forth broad, but surely no less painful, allegations of fraud and misrepresentation. Appellant submits that the issues and defenses raised are sufficiently meritorious to warrant at the very least a hearing on the merits to remove this ignominious "sword of Damocles" Appellee has placed over the head of Appellant by the action in the lower Court.

3. Where title is regular on its face and of record, disputant is estopped to deny matters relevant to transfer.

It has been amply demonstrated by the foregoing that the facts and record presented to the Court below show valid title to the property involved as resting with Appellant. Assuming arguendo, that such is not completely the case, the facts are more than sufficient to put in issue the question of title justifying a trial on the merits. If it is assumed that the facts presented show a lack of fraud and misrepresentation on the part of Appellant in Appellee's execution of the deed, the cases are legion which hold that the grantor in a deed, and those in privity with him, are not only estopped from disputing the deed itself, but every fact it recites (e.g. see Morris v. Wheat, 1896, 8 App. . . D.C. 379). If nothing more, enough of a question has been raised to warrant a trial on the merits of this matter.

CONCLUSION

Appellant, therefore, concludes for the reasons stated above, that the District Court Judge abused his discretionary powers and erred in denying Appellant's Motion to Set Aside Entry of Default and to Vacate the Judgment Thereon.

Respectfully submitted,

BELFORD V. LAWSON, JR.
ARNOLD A. STAHL
Suite 701—RCA Building
1725 K Street, N.W., Washington 6, D.C.
Attorneys for Appellant

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

BLONDINE C. HOLLAND HUGHES

Appellant

Vs.

CLARA B. HOLLAND,

Appellee

No. 17,494

Exhibit 1

APPELLANT'S AFFIDAVIT

District of Columbia, ss:

Blondine C. Holland Hughes, being first duly sworn on oath deposes and says that she is the party whose name appears as appellant in this cause, and that she makes this affidavit to refute testimony given by appellee at a hearing on default on October 18, 1962, in the case of Clara B. Holland v. Blondine C. Holland Hughes, CA No. 2457-62, in the United States District Court for the District of Columbia.

1. Affiant states that she was advised by counsel that it was not necessary for her to attend the hearing on default in the above--captioned matter.

2. Affiant states further that had she attended said hearing, she would have stated as follows:

a. From March, 1959, she paid the notes on the property in question every month save August and September, during which months affiant did not receive

checks from her employment as schoolteacher. . This was according to the agreement between affiant and her mother, Appellee herein.

b. Affiant has in her possession all the cancelled checks representing payments on the notes covering the property in question.

c. Appellee's discomfort while residing with Affiant was due to Appellee's dislike of Affiant's husband, which discomfort Affiant believes precipitated the original action herein.

d. Appellee held out Affiant to the public as owner of the property in question in the following instances:

(i) The Department of Welfare's records show that benefits were paid to Appellee for supporting children of a deceased daughter, which payments were made to Appellee at 814 Missouri Avenue, N.W., which property Appellee asserted to Department of Welfare as belonging to Affiant.

/s/ Blondine C. Holland Hughes
Affiant

Sworn and subscribed before me this 15 day of March, 1963.

/s/ William D. McRae
Notary Public, D. C.

INDEX

	Page
Complaint to Set Aside Deed Procured by Fraud and Misrepresentation and for an Accounting and Damages, Filed August 3, 1962	1
Entry of Default, September 7, 1962	3
Excerpts from Transcript of Proceedings, October 18, 1962	3
Witnesses:	Tr. Page
Clara B. Holland	
Direct	9 4
Cross	11 5
Order Setting Aside Deed, Filed October 19, 1962	7
Motion to Set Aside Entry of Default and to Vacate the Judgment Thereon, Filed October 31, 1962	8
Denial of Motion, November 13, 1962	9
Affidavit of Blondine C. H. Hughes [Exhibit A]	9
Answer, Filed October 31, 1962	11
Order Denying Motion to Set Aside Entry of Default and to Vacate Judgment Thereon, Filed November 15, 1962	12
Notice of Appeal, Filed November 16, 1962	13
Points Relied on by the Appellant, in the United States Court of Appeals for the District of Columbia Circuit, No. 17,494	13
Motion for Leave to File Statement as to Contents of Joint Appendix, and to Extend Time in Which to File Same, Filed Jan. 18, 1963	14
Order Granting Appellant's Motion, Filed January 29, 1963	15
Motion to Dismiss, Filed February 11, 1963	15
Appellant's Answer to Motion to Dismiss Appeal, with Motions to Extend Time for Filing Statement as to Contents of Joint Appendix and Appellant's Brief on Appeal, Filed February 18, 1963	17
Appellee's Reply to Appellant's Answer to Motion to Dismiss, Filed February 21, 1963	19
Order Denying Motion to Dismiss, Filed March 8, 1963	20

JOINT APPENDIX

[Filed August 3, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Clara B. Holland
4 L Street, N. W.
Washington, D. C.,
Plaintiff,

vs.

Blondine C. Holland Hughes
814 Missouri Avenue, N. W.
Washington, D. C.,
Defendant.

Civil Action No. 2457-'62

COMPLAINT TO SET ASIDE DEED PROCURED BY FRAUD AND MISREPRESENTATION AND FOR AN ACCOUNTING AND DAMAGES

1. Jurisdiction of this court is founded on Title 12, Section 401 of the District of Columbia Code, 1951 Edition, and the amount involved is more than three ($3,000.00) thousand dollars.

2. The plaintiff, Clara B. Holland, is an adult citizen of the United States and a resident of the District of Columbia, and files this suit as the legal and equitable owner of Lot 146 in Square 2989, improved by premises 814 Missouri Avenue, N.W., in the District of Columbia.

3. That the defendant Blondine C. Holland Hughes, is an adult citizen of the United States and a resident of the District of Columbia.

4. That heretofore the plaintiff purchased Lot 146 in Square 2989, improved by premises 814 Missouri Avenue, N.W., in her own name and for her own behoof.

5. That this plaintiff is inexperienced in business matters, and the defendant, through one Robert W. Ewell, asked this plaintiff to sign

a paper so he could straighten out some automobile insurance matters for the defendant; that this plaintiff, relying on the representations made to her, did sign the paper presented to her, and at the time of the signing, this plaintiff did not know the contents of said paper.

6. That this plaintiff later learned that the paper which she signed was a deed conveying the above described real estate to Blondine C. Holland, now Blondine C. Holland Hughes; that the signature of this plaintiff was procured by trick, fraud and misrepresentation, and without this plaintiff knowing the contents of the paper which she signed.

7. That this plaintiff was not asked to make oath to the paper which she signed, but a search of the Records of the Office of the Recorder of Deed for the District of Columbia discloses that the instrument signed was dated July 23rd 1959, and was recorded November 27th 1959 in Liber 11,346 at folio 338.

8. That this plaintiff did not know that the aforementioned paper writing had been recorded in the office of the Recorder of Deeds until she received a notice from the holders of the Second Deed of Trust to the effect that the payments were in arrears.

9. That this plaintiff, the mother of the defendant herein, has been greatly damaged, humiliated and embarrassed by the wrongful acts of the defendant, her agents, servants and employees; that this plaintiff had no intention of conveying the above described real estate to the defendant, and plaintiff has received no value for the said transfer.

WHEREFORE, the premises considered, your plaintiff prays:

1. That the defendant be restrained from further encumbering the above described real estate.

2. That the defendant be required to convey the title to said real estate to this plaintiff, the rightful owner.

3. That if the defendant is unable to reconvey the said real estate to this plaintiff, that damages in the sum of Seven Thousand ($7,000.00) Dollars be assessed against the defendant in favor of this plaintiff.

4. That the plaintiff may have such other and further relief as the nature of the case may require and to the Court may seem just and proper.

/S/ J. Franklin Wilson
Attorney for Plaintiff

/S/ Clara B. Holland
Plaintiff

[Verification and Jurat dated August 1, 1962]

[Docket Entry of Default, September 7, 1962]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.
Thursday, October 18, 1962

The above-entitled cause came on for hearing before THE HONORABLE RICHMOND B. KEECH, United States District Judge, at 9:50 a.m.

* * * * * *

3 THE COURT: All right. Mr. Coombs, what have you to report in this matter, which we did carry over to accord your client an opportunity.

MR. COOMBS: Your Honor, we have been unsuccessful in raising the money. And I cannot report to the Court that I have funds in hand with which to stop the foreclosure at this time. There is a possibility that this can be done, and more than a possibility, but it takes more than today, I am able to say to Your Honor.

* * * * * *

5 THE COURT: Time is of the essence.

MR. COOMBS: Time is of the essence, and my personal disposition is to have as little litigation about this as possible. And I think the Court, in all fairness, has given us a chance -- not a chance to

be heard, of course, on the merits. We seem not to have that at this particular time. However, I would not like to have an extended litigation after this. Whatever steps I think we can take, if Your Honor will direct the defendant to convey, to reconvey, that will give us a substantial opportunity to comply or take any legal steps that would be incident to it. I think she has an interest, Your Honor.

* * * * * *

6 THE COURT: She wasn't interested in coming in and doing anything about her case. This case was filed in August, August 3; the first part of August, and this is now almost November.

MR. COOMBS: As Your Honor recalls, I represented to the

7 Court what was substantially in her affidavit, that she did see counsel; that she did go. But of course --

THE COURT: She has got a right of action, if the facts warrant it, against counsel for malpractice, and I don't think because of this she can prejudice this person.

MR. WILSON: Mr. Coombs mentioned the fact --

THE COURT: I am not going to go into that, Mr. Wilson. You are here on default. But what I want to find out is what is the most direct method of accomplishing here what you have prayed for.

* * * * * *

8 MR. WILSON: She was living in the property. After the defendant got married she made it so uncomfortable she moved out. And that is when she discovered that this deed had been signed that she thought was some other paper, as is shown by the pleading.

* * * * * *

9 CLARA B. HOLLAND

* * * * * *

DIRECT EXAMINATION

BY MR. WILSON:

* * * * * *

Q. And you were the owner of premises 814 Missouri Avenue?

A. I was.

Q. And when did you move out? A. I moved out on January 17, 1962.

Q. And why did you move out? A. My daughter made it so unpleasant for me, after I discovered that she had changed my deed,

10 that I had to move. I have my dead daughter's five children. And the husband got disagreeable to them. Kept the children and me upset. I moved.

Q. You moved January 17, 1962? A. Yes.

Q. And have you received any compensation for the property since that time? A. Not a cent.

* * * * * *

11 CROSS-EXAMINATION

BY MR. COOMBS:

Q. How long had you lived in this property? A. We moved there in April 1957.

Q. April 1957. You moved out in January of 1962? A. 1962.

Q. You occupied the premises rent-free for approximately three years?

THE COURT: Occupied her premises?

A. I paid the notes until I left.

BY MR. COOMBS:

Q. Do you have any evidence of your payment of the notes? A. Yes. I have the receipt book there.

Q. Now, is it not a fact that the notes were paid by check signed in the name of your daughter, and that they were drawn on her account? A. I suppose they were, after she took my check.

Q. Just answer my question, please.

THE COURT: After she took your check?

THE WITNESS: Supposedly to be paying the notes out of it.

THE COURT: You are saying that she took your personal check, your money?

THE WITNESS: Yes, sir.

12 THE COURT: And then made use of that possibly?

THE WITNESS: Made her check to pay the note.

BY MR. COOMBS:

Q. Do you have any record of your payments to your daughter? A. I have the payment to my daughter.

Q. Those are -- A. Oh, no, I have no record.

Q. You have no check, nothing to show that you gave your daughter any money at all? A. I do not.

Q. Isn't it a fact that these checks were drawn from your daughter's account? A. What checks are you speaking of?

Q. These notes were paid? A. I don't know, because she had the book.

Q. Did you make any direct payment at all to the noteholders? A. Yes. I used to send payments by my grand-daughter to the bank, and by living with my daughter --

Q. Which payment? Cash? Check or what? A. Cash. And by my government check.

Q. Now, if I told you that I have in my possession all of the checks by which these payments were made, would your testimony remain the same? A. It would be the same; because I gave her my check, depended on her to pay my bills.

* * * * * *

BY MR. COOMBS:

Q. Mrs. Holland, is it your testimony that you were compelled to leave 814 Missouri Avenue? A. Yes; for my own safety.

Q. What are the circumstances that indicate to you that your safety was involved there? Did someone threaten you? A. No. I have a heart condition. And I can't afford to be upset with quarreling and arguing, and I felt it better for myself and children to vacate.

Q. You did that voluntarily? No one forced you to do it? A. No one forced me, no. But, under the circumstances, I was forced to.

* * * * * *

THE WITNESS: Yes, sir. I didn't know that she had taken possession of it until I had been up there on Missouri Avenue almost

five years.

* * * * * *

18 A. I never told anyone the house belonged to my daughter.

THE COURT: We are not going to go into that. You have been in default here.

* * * * * *

[Filed October 19, 1962]

ORDER SETTING ASIDE DEED

This cause coming on to be heard at this term of court upon the complaint filed herein by Clara B. Holland, a default having been entered and a certificate of readiness having been filed herein, upon consideration of all of the pleadings filed in this cause and the testimony of the plaintiff taken in open court and the argument of counsel for both parties, the Court finds that there has been a default on the part of the defendant in this cause and that the plaintiff is entitled to the relief sought by her complaint, it is by the Court this 19th day of October, 1962,

ADJUDGED, ORDERED and DECREED, That the deed from Clara B. Holland to Blondine C. Holland, now Blondine C. Holland-Hughes, bearing date the 23rd day of July, 1959 and recorded November 27th, 1959, in Liber 11346 at folio 338 of the Land Records of the District of Columbia, conveying Lot 146 in Square 2989, improved by premises 814 Missouri Avenue, N.W., be and the same is hereby set aside and held for naught, the title to said real estate to remain the same as before the recordation of said deed.

And it is further ORDERED, That the defendant, Blondine C. Holland Hughes, pay to the plaintiff, Clara B. Holland, the sum of Five Hundred ($500.00) Dollars as compensation for the loss and damage sustained by the plaintiff.

It is further ORDERED that the defendant, Blondine C. Holland

Hughes pay to plaintiff the further sum of One Hundred and Fifty ($150.00) Dollars for services rendered to and on behalf of the plaintiff in connection with this cause.

And it is further ORDERED that the defendant, Blondine C. Holland Hughes vacate premises 814 Missouri Avenue, N.W., and deliver the possession of same to the plaintiff within 15 days from the date of service of this order.

/S/ R. B. Keech
JUDGE

* * *

[Certificate of Service]

[Filed October 31, 1962]

MOTION TO SET ASIDE ENTRY OF DEFAULT AND TO VACATE THE JUDGMENT THEREON

1. Comes now the defendant, Blondine C. Holland Hughes, by and through attorney, and moves the Court to vacate and set aside the entry of default and the final judgment thereon entered against this defendant on or about the 19th day of October, 1962, and to permit the defendant to file an answer in the above styled and numbered cause and to defend the cause fully.

2. This motion is made upon the ground that the default and the judgment thereon was taken against said defendant through her mistake, inadvertence, surprise or excusable neglect in that defendant erroneously believed that an Answer had been made on her behalf as is shown more particularly by the Affidavit attached hereto as Exhibit "A".

3. Defendant is advised and believes that she has a good and sufficient defense to the plaintiff's claim as appears from the verified Answer attached hereto.

WHEREFORE, defendant prays for an order setting aside the entry of default and vacating the final judgment thereon on the date

aforesaid and for leave to file her Answer and fully defend this cause.

/S/ Lynn O Coombs
Attorney for Defendant

* * * * * *

[Certificate of Service]

[Considered and Denied. See in this connection action of Court October 16, 1962, signed R. B. Keech, Judge, November 13, 1962.]

[Filed October 31, 1962]

Defendant's Exhibit A

AFFIDAVIT OF BLONDINE C. H. HUGHES

District of Columbia, ss:

BLONDINE C. HOLLAND HUGHES, being first duly sworn on oath deposes and says that she is the party whose name appears as defendant in this cause, and that she makes this affidavit in support of her Motion to Set Aside Entry of Default and Judgment thereon.

1. Affiant states that she received service of summons and complaint herein on or about the 6th day of August, 1962, and immediately conferred with an attorney, requesting him to prepare an answer for filing in this cause; affiant delivered to him the citation served upon her and also all subsequent papers relating to this cause received by her.

2. On or about August 15, 1962, said attorney was appointed to a post in government service and closed his office for private practice, affiant later learned. In the course of this swift change, said attorney did not have time to research and prepare an answer within the time allotted and made arrangement to have another attorney, other than the one who is filing this motion, take up the care and handling of his unfinished cases. Through some error or misunderstanding, said attorney misplaced the citation served upon the affiant and took no action upon it in time to prevent an entry of default herein, and after the entry of the default judgment was taken over the opposition of the affiant

who was not allowed to file a verified answer or a motion to set aside entry of default, supported by an affidavit. Affiant states that she did not know or understand that she was in default or the consequences thereof until on or about the 10th day of October when she had notice that a hearing in this matter was set for October 16, 1962, and that no answer had been filed and no extension of time to answer requested.

3. Affiant avers that the failure to file an answer until this date was not intentional on her part but was the result of circumstances surrounding her previous attorney's termination of practice.

4. Affiant states further that she had no funds or resources to seek the services of another at the time of her default in that she had been separated from her husband, that she was and is pregnant, ill and depressed therefrom; and totally unable to take care of her affairs as normally she would have done. Immediately, however, upon learning that no responsive pleading had been made on her behalf, she consulted Attorney Lynn O. Coombs, and had this attorney check the Court records; and finding that a default has been entered, affiant asked him to represent her and to file this Motion to Set Aside Entry of Default and Judgment thereon and apply to the Court for leave to file the verified answer here presented.

5. Affiant states that she has been advised that she has a good and sufficient defense to the matters alleged in this cause and she verily believes that the merit of this cause should come before the Court.

WHEREFORE, affiant prays the Court for an Order setting aside the entry of default and the judgment thereon, and for a further order granting leave for her Answer to be filed.

/S/ Blondine C. H. Hughes
Affiant

[Jurat dated October 29, 1962]

[Filed October 31, 1962]

ANSWER

Now comes the defendant, Blondine C. Holland Hughes, and, answering the Complaint on file herein, states as follows:

1. Defendant admits the jurisdiction of the Court as set forth in paragraph number 1 of said complaint.

2. Defendant also admits the qualification of the parties as set forth in paragraphs numbered 2 and 3 of the complaint on file but denies the allegation that the plaintiff is legal or equitable owner of Lot 146 in Square 2989 and improvements in the District of Columbia as alleged in paragraph 2.

3. Defendant admits the material allegations contained in paragraph 4 of said complaint.

4. Defendant admits that a conveyance of the property here involved was made to her and the same acknowledged and recorded in Liber 11,346 at folio 338 of the land records of the District of Columbia; beyond this, defendant denies specifically and generally all of the allegations contained in paragraphs numbered 5, 6, 7, 8 and 9 of plaintiff's complaint.

For further and separate affirmative defense, this defendant alleges:

5. That the plaintiff is estopped to deny the conveyance recited by deed mentioned in the complaint herein; said deed was executed and delivered to the defendant for a full and fair consideration, without fraud or misrepresentation on the part of the defendant, and with full understanding and knowledge by the plaintiff of the parts, content and provisions contained therein. Contrary to the matter alleged, plaintiff was not inexperienced in conveying property by deed, having been party to several such instruments within recent memory; and if questions were to be raised, she had, at hand, resources of information and advice for reference. Further, plaintiff fails to state with particularity any ground for the interference by the Court to abrogate, alter, modify or in any way reform or correct the deed in question. By reason

thereof, plaintiff ought not to be admitted to deny her act and deed.

Answering further, plaintiff alleges:

6. That for over two years, plaintiff had actual and continuing notice that defendant was in open, uncontested physical possession of the property, during which time she wholly failed to inform the defendant of any claims as asserted by her in this suit. She lived with the defendant. She knew that the defendant paid the notes on the property as they became due with defendant's own funds; and on every occasion when she was required to speak out, she acquiesced by conduct and conversation, in the title to the property herein as resting in the defendant. Defendant would not have asserted any of prerogatives of ownership, if she had known that plaintiff was asserting any interest in the premises. Under the circumstances here related, plaintiff ought not be admitted to say that she misunderstood her act and deed.

WHEREFORE, defendant prays that plaintiff take nothing by her action on file, and that the same be hence dismissed with the costs and disbursements hereof assessed against her.

/S/ Blondine C. Holland Hughes
Defendant

[Verification and Jurat dated October 15, 1962]

[Filed November 15, 1962]

ORDER DENYING MOTION TO SET ASIDE ENTRY OF DEFAULT AND TO VACATE JUDGMENT THEREON

This cause coming on for consideration upon the motion of the defendant to set aside the entry of default and to vacate the judgment thereon, upon consideration whereof and of the affidavit filed therewith and of the objections filed herein on the part of the plaintiff to the granting of said motion, it is this 15th day of November, 1962, by the Court,

ORDERED, that the said motion be and the same is hereby denied.

/S/ R. B. Keech
Judge

[Filed November 16, 1962]

NOTICE OF APPEAL

Notice is hereby given this 16th day of November, 1962, that Blondine C. Holland Hughes, defendant named above, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 19th day of October, 1962 in favor of the plaintiff, Clara B. Holland and against said defendant, Blondine C. Holland Hughes.

/S/ Lynn O. Coombs
Attorney for Defendant

* * *

Please mail copy to:
J. Franklyn Wilson, Esq., Attorney for Plaintiff

* * *

[Filed January 7, 1963]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,494

Blondine C. Holland Hughes,
Appellant

v.

Clara B. Holland,
Appellee

POINTS RELIED ON BY THE APPELLANT

I.

Default judgment may not be entered where the court must choose between conflicting reports as to default.

II.

Disputed questions as to title to realty require hearing upon the merits between the parties.

III.

Where title is regular on its face and of record, disputant is

estopped to deny matters relevant to the transfer.

Respectfully submitted,

/S/ Lynn O. Coombs
Attorney for Appellant

[Filed January 18, 1963]

MOTION FOR LEAVE TO FILE STATEMENT AS TO CONTENTS OF JOINT APPENDIX, AND TO EXTEND TIME IN WHICH TO FILE SAME

Comes now the appellant, defendant in the case of Clara B. Holland v. Blondine C. Holland Hughes, Civil Action No. 2457-'62, in the United States District Court for the District of Columbia, who, having duly taken an appeal to this Court from the judgment in said case in the Court below, by her attorneys moves this Honorable Court for an order granting her leave to file a statement of the parts of the record she proposes to print in the joint appendix, and for an extension of time to and including February 10, 1963, in which to comply with the requirements of Rule 16(b) of the Rules of this Court regarding same.

For grounds of this motion, appellant states:

1. Appellant's previous counsel of record failed to timely comply with the requirements of the aforestated rule requiring appellant's statement as to the contents of the joint appendix to have been filed within ten (10) days after the record herein had been filed, said due date having been January 7, 1963.

2. Appellant released and discharged her previous counsel of record on January 9, 1963, without knowledge of said counsel's failure to timely comply with the requirements of the aforestated rule.

3. Present counsel of record was retained by appellant on January 11, 1963, to prosecute the above-designated appeal and has had neither sufficient time in which to become familiar with the case and record herein, nor opportunity to comply as yet with the procedural

rules of this Court.

Respectfully submitted,

Belford V. Lawson, Jr.
Arnold A. Stahl

By /S/ Arnold A. Stahl
Attorneys for Appellant

* * * *

[Certificate of Service]

[Filed January 29, 1963]

Before: Bazelon, Chief Judge, in Chambers.

ORDER

On consideration of appellant's unopposed motion for leave to file statement as to contents of the joint appendix, and to extend time in which to file same, it is

ORDERED that the time for filing appellant's statement as to contents of the joint appendix is hereby extended to and including February 10, 1963.

Dated: January 29, 1963

[Filed February 11, 1963]

MOTION TO DISMISS

Comes now the appellee, by her attorneys, and moves the Court to dismiss the above appeal, and as reasons for the same states as follows:

1. The appeal herein was noted November 16th, 1962. The record was filed in this Court on December 26th, 1962.

Rule 18(a) of the Rules of this Court requires the appellant's brief to be filed forty (40) days after said date of filing, which date would be on or before February 4th, 1963. The appellant has failed to

file her brief within the above allotted time, nor did she seek any extension of time for such filing.

The basis of the appeal is to reverse the trial court's order denying the appellant's motion to vacate default judgment.

2. Rule 73(c) of the Federal Rules of Civil Procedure provides for and requires the appellant to file a cost bond with the notice of appeal in sum of $250.00.

The appellant has failed to file such a cost bond at the time of the noting of the appeal, nor has she filed any such bond since that time, and there is presently no bond filed.

This Court had an occasion to dismiss an appeal for the very same reason. See Tracy v. Shapiro, Appeal No. 15,260 dismissed August 28th, 1959.

In view of the action of this Court in Tracy v. Shapiro and a similar failure exists in this case, coupled with the fact that the brief has not been timely filed, the appellee says that this appeal should likewise be dismissed.

Respectfully submitted,

/S/ J. Franklin Wilson

/S/ Herman Miller

* * *

Attorneys for Appellee

[Certificate of Service]

[Filed February 18, 1963]

APPELLANT'S ANSWER TO MOTION TO DISMISS APPEAL, WITH MOTIONS TO EXTEND TIME FOR FILING STATEMENT AS TO CONTENTS OF JOINT APPENDIX AND APPELLANT'S BRIEF ON APPEAL

Appellant, defendant below, by her attorneys, moves this Honorable Court to deny the appellee's motion to dismiss herein, and to grant appellant extensions of time in which to file her statement as to contents of the joint appendix and her brief on appeal in this case, and for reasons therefor states as follows:

1. Notice of appeal herein was filed on November 11, 1962, the record was filed on December 26, 1962, and Statements of Points on Appeal filed January 7, 1963, all of which were timely filed by appellant's former counsel of record.

2. Present counsel of record was initially contacted and retained on January 11, 1963, upon the understanding that appellant was terminating the services of her former counsel. Based upon this understanding, present counsel on January 18, 1963, filed both its appearance herein and a Motion to Extend Time for Filing Statement as to Contents of Joint Appendix, the latter having been granted on January 29, 1963, to and including February 10, 1963. Present counsel was preparing a Motion to Extend Time for Filing Appellant's Brief on Appeal when it was learned that Appellant's former counsel had not withdrawn from the case. This factor posed an ethical question which concerned present counsel greatly and caused a short delay during which the problem was considered. Appellant's former counsel did not notify present counsel of his withdrawal until February 8, 1963, subsequent to the time when appellant's brief on appeal was due.

3. On February 8, 1963, present counsel proceeded immediately to file appellant's cost bond, which filing was prior to the filing of Appellee's Motion to Dismiss and contradicts appellee's allegation as to same in said Motion to Dismiss.

4. Present counsel was not able to obtain a transcript of the

proceedings below from the Court Reporter until February 8, 1963.

5. Appellant, for the past month, has been with child and in an extremely delicate condition, the delivery of said child being expected at any time within the aforesaid period. This condition has made and still renders appellant totally inaccessible for any consultation by present counsel, and has been a serious factor in the delays herein. Consultation has been necessary in view of the fact that Appellant, on advice of her former counsel, did not make a personal appearance at the proceedings below.

6. For further answer to the Motion to Dismiss, Appellant says that she has a good and meritorious cause for appeal in this case; that the delay in filing her statement as to contents of joint appendix and her brief on appeal herein, or motions for extensions of time in which to file same, was due to the unusual and extraordinary circumstances set forth above and was not the result of dilatory practices; that the cost bond, pursuant to Rule 10 of the rules of this Court, was timely filed; that justice requires that the appeal not be dismissed but reinstated; and that the Appellant be granted sufficient time, in view of the foregoing, to and including March 15, 1963, to file her statement of contents of joint appendix and her brief on appeal herein.

Belford V. Lawson, Jr.
Arnold A. Stahl
Attorneys for Appellant

* * *

By /S/ Arnold A. Stahl

[Certificate of Service]

[Filed February 21, 1963]

APPELLEE'S REPLY TO APPELLANT'S ANSWER TO MOTION TO DISMISS

The appellee says, in response to the appellant's answer as follows:

1. With respect to the bond the Motion to Dismiss was prepared and mailed on February 9, 1963, to appellant's counsel.

The appellant did not file her bond, until after receipt of the said motion. Said bond was filed in the Clerk's office of the District Court on February 11, 1963.

2. With respect to the filing of the brief it is conceded that the appellant's present counsel filed their appearance January 18, 1963 and received an extension of time to and including February 10, 1963, to file statement as to contents of the joint appendix. No request was made nor was any extension granted with respect to extending the time to file the brief.

The fact that the present counsel learned that the appellant's former counsel had withdrawn had not prevented their filing of the appearance. Their appearance being in the case, nor did it prevent them from filing a Motion to Extend Time for Filing Statement as to Contents of Joint Appendix. No reason is advanced or given as to why they could not have filed a Motion to Extend Time for Filing Brief. Filing their appearance and requesting an extension of time to file the statement concerning the joint appendix apparently had not posed any ethical question and it seems to us that out of an abundance of precaution they should have requested an extension to file the brief. According to the records in the Clerk's office in the District Court the bond was not filed on February 8, 1963, but the record shows the bond to have been filed on February 11, 1963, which would be the same day (Monday) that counsel received the Motion to Dismiss. Rule 18(g) provides that the briefs filed at the time can only be done by leave of Court for extraordinary reasons and we do not think that the reasons set forth here show as to why a motion was not filed for an extension nor do the reasons

given present extraordinary reasons.

/S/ Herman Miller
Attorney for Appellee

[Certificate of Service]

[Filed March 8, 1963]

Before: Edgerton, Wilbur K. Miller and Danaher, Circuit Judges, in Chambers.

ORDER

On consideration of appellee's motion to dismiss, of appellant's answer thereto, and request for extensions of time for filing statement of points, statement as to contents of the joint appendix and brief, and of appellee's reply, it is

ORDERED by the court that the motion to dismiss be denied and the time for filing appellant's statement of points and statement as to contents of the joint appendix and appellant's brief is hereby extended to and including March 15, 1963.

No further extensions of time for filing said statements or brief will be granted except for extraordinary and unforeseeable cause shown.

Per Curiam.

Dated: March 8, 1963

[Filed November 9, 1962]

OBJECTIONS TO MOTION TO SET ASIDE ENTRY OF DEFAULT AND TO VACATE JUDGMENT THEREON

Comes now J. Franklin Wilson, attorney for the plaintiff in the above-entitled cause, and objects to the defendants motion to set aside the entry of default and vacate the judgment thereon, and for cause therefor states:

1. That the defendant, in her affidavit, does not allege that she had "retained counsel" but that she "conferred with an attorney, requesting him to prepare an answer for filing in this cause".

2. That the defendant had an opportunity to file and answer as the Court continued the matter for two days to give the defendant time to raise the necessary funds to stop the foreclosure case on the property involved in this suit.

3. That the plaintiff was compelled to raise the funds necessary to stop the foreclosure sale, at great expense, as follows:

a. To the Perpetual Building Association	$288.00
b. To Mrs. Bertha E. McKenzie, holder of the 2nd trust note	630.00
Total amount paid to note holders	$918.00

4. That the defendant has failed to show the proper diligence in defendant this cause and has failed to show good faith in protecting the real estate by keeping up the monthly payments thereon.

5. That had it not been for the very arduous endeavors of the plaintiff in raising the funds to prevent the foreclosure, the question of ownership in this cause would be "moot", as the property would have been foreclosed on.

6. Other good and sufficient grounds and reasons which will be called to the attention of the Court upon the hearing on this motion, and objections thereto.

/s/ J. Franklin Wilson
Attorney for Plaintiff
1020 U. Street N.W.

[Certificate of Service]

DOCKET ENTRIES

Date	Proceedings	
1962		
Aug. 3	Complaint, appearance	filed
Aug. 3	Summons, copies (1) and copies (1) of Complaint issued served 8-6-62	filed
Sept. 7	Military affidavit.	filed
Sept. 7	Affidavit in support of default.	filed
Sept. 7	Default vs. deft.	By Clerk
Sept. 7	Calendared (N) (AC/N)	
Sept. 13	Certificate of Readiness by plaintiff; c/m 9-13-62.	filed
Oct. 5	Affidavit of mailing.	filed
Oct. 18	Heard: Finding for plaintiff in amount of $650.00 and vacating deed. (Rep. E. Romig)	Keech, J.
Oct. 19	Order setting aside deed. ser 10-23-62	Keech, J.
Oct. 31	Motion of deft to set aside entry of default & to vacate judgment; P & A; c/m 10-29-62; affidavit; exhibit; MC 10-31-62.	filed
Nov. 9	Objections of pltff to motion to set aside entry of default & to vacate judgment; c/m 11-8-62.	filed
Nov. 15	Order denying motion of deft to set aside entry of default or to vacate judgment. (N)	Keech, J.
Nov. 16	Notice of appeal by deft; copies mailed to J. Franklin Wilson; deposit by Coombs $5.00.	filed

APPELLEE'S BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,494

BLONDINE C. HOLLAND HUGHES,

Appellant,

v.

CLARA B. HOLLAND,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERMAN MILLER

421 - 4th Street, N. W.
Washington, D. C.

J. FRANKLIN WILSON

1020 You Street, N. W.
Washington, D. C.

Attorneys for Appellee

STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee the question presented is whether or not the trial court arbitrarily denied the appellant's motion to vacate default where the appellant failed to tender the necessary sums to prevent a foreclosure sale of the subject property as one of the conditions before the motion to vacate the default would be granted.

INDEX

	Page
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	6

TABLE OF CASES

Bush v. Bush, 61 App. D.C. 357, 63 F.2d 134	5
Cockrell v. Fillah, 60 App. D.C. 210, 50 F.2d 500	5
Italia Societa Anonima Di Navigazoine v. Cavalieri, 1959, D.C. Mun. App., 99 A.2d 488	5

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,494

BLONDINE C. HOLLAND HUGHES,

Appellant,

v.

CLARA B. HOLLAND,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEE'S BRIEF

COUNTERSTATEMENT OF THE CASE

The appellee, on August 3, 1962, filed her complaint to vacate deed procured by appellant's fraud and misrepresentation and for damages, alleging that in her own right she purchased 814 Missouri Ave., N.W., Washington, D. C. She stated she was inexperienced in business matters. The appellant, through one Ewell, asked her to sign a paper so

that some automobile insurance matters could be straightened out and, relying on these statements, she signed what later turned out to be a deed to the appellant. She stated at the time she did not know the contents thereof; that although it appears from the paper she appeared before a notary public, she did not do so in fact. She stated that her signature had been procured by trick, fraud and misrepresentation, without her knowing the contents of the paper. She stated she did not know this paper was recorded among the Land Records of the District of Columbia until she received notice from the holders of the second deed of trust secured on said property that payments thereon were in arrears. She further stated that she was damaged, humiliated and embarrassed by acts of the appellant, her agents, servants and employees; that she did not have any intention of conveying said real estate to the appellant, and further she received no value for such transfer. She requested injunction restraining sale, reconveyance of the property to her and damages of $7,000.00 in addition to general relief. (J.A. 1, 2 and 3) Docket entry shows service on August 8, 1962, and a military affidavit and affidavit in support of default, and default against appellant September 7, 1962, and the same day the case was calendared for hearing as to damages. On September 13, 1962, a certificate of readiness was filed, and an affidavit of mailing on October 5, 1962. (J.A. 22)

On October 18, 1962, a hearing was held on default. The case had been previously called and continued to October 18, 1962. The purpose of the continuance was to afford the appellant an opportunity to raise necessary funds to stop a foreclosure sale on the subject property by the lien holder, which the appellant failed to do. (J.A. 21) Page 3 J.A. shows this and on the same page appellant's counsel advised the Court that they were unsuccessful in raising the money, to which the Court's reply was that time was of the essence.

At this hearing the Court took testimony concerning the damages (J.A. 4, 5 and 6), and on October 18, 1962, entered an order vacating the deed and assessed damages of $500.00 plus $150.00 attorney fee against the appellant.

On October 31, 1962, appellant filed motion to vacate default, and filed points and authorities as well as an affidavit and verified answer. (J.A. 8, 9, 10, 11 and 12)

On November 9, 1962, appellee filed her objections, stating among other things that appellant had not retained counsel at time she first discussed the case with him, but she merely conferred with an attorney, that the Court afforded the appellant an opportunity of raising the necessary funds to stop the sale, and that the appellee was compelled to raise $918.00 in order to do so. The objections also stated the appellant had not acted in good faith in failing to protect the property by keeping up the monthly payments thereon, and had it not been for the vigorous efforts of the appellee in raising the above funds to prevent foreclosure the question of ownership would be moot.

On November 13, 1962, the Court made a note on the motion to vacate default "Considered and denied." See in this connection action of the Court October 16, 1962 (J.A. 9), and a formal order of denial of the motion to vacate was entered November 15, 1962 (J.A. 12), from which appellant noted her appeal (J.A. 13).

SUMMARY OF ARGUMENT

The question of vacating the default entered September 7, 1962, was discretionary and when considered in the light of the provisions of the statute (28 U.S.C.A. Federal Rules of Civil Procedure Rule 60(b)) "upon such terms as are just," the Court did not abuse its discretion.

ARGUMENT

The record shows on date of hearing, the matter had previously come up and because of the danger of foreclosure the Court was requiring the appellant to make the payments on the deeds of trust to prevent such action. Her attorney at the time stated the unsuccessful attempts to raise money, and the objections filed by the appellee clearly show that $918.00 was required. The Court had a right then to consider this when the motion was presented to vacate the default, and the failure of appellant to tender or pay such sums to prevent foreclosure did not meet the requirement of "upon such terms as are just" which the Court imposed before granting such motion. It is evident that these payments by the appellant were a most urgent requirement since the Court commented on page 3 of the Joint Appendix that "Time is of the essence." The Court also apparently found that such failure to pay the trust payments by the appellant prejudiced the appellee, for on page 4 of the Joint Appendix is the language, "She has a right of action, if the facts warrant it, against counsel for malpractice, and I don't think because of this she can prejudice this person."

The appellant is incorrect when her brief argues that the motion to vacate the default was not heard. The Court was fully aware of the facts in the hearing on October 18, 1962, and since there was no showing of payment by the appellant prior to or at the time the motion was submitted, the satisfaction of the requirement "on such terms as are just" had not been met. In addition, the Court had appellant's motion, affidavit and answer before it.

The appellant is likewise incorrect when she states "as soon as she was notified she took immediate steps to cure the default." The record shows certificate of readiness was mailed to her on October 5, 1962, and she took no steps to move to vacate the default until October 31, 1962, more than 20 days after mailing the certificate of readiness. She knew of the hearing on the default prior to October 16, 1962, in that

her new counsel was present at this hearing and had the hearing postponed two days in an effort to raise the money which he reported to the Court on October 18, 1962 that he had failed. Even on her own statement knowing of the default on October 10, 1962, she still failed to file any motion within 20 days of such knowledge. The defenses in the answer as to consideration are merely conclusions; what the consideration consisted of are likewise conclusions.

We agree with the appellant's statement that motions to vacate defaults are addressed to the sound discretion of the Court, Cockrell v. Fillah, 60 App. D.C. 210, 50 F.2d 500, but in reaching a conclusion the Court must consider the clauses of the Rule (Rule 60(b)) imposing the condition "upon such terms as are just." Here, the appellant claims the property, fails to make payments on the encumbrances to the extent of $918.00, and, in order to prevent the foreclosure, the appellee by strenuous effort makes the payment and the appellant refuses or fails to reimburse the appellee. If the appellee had not made the payments, the issue of ownership would become moot. The appellant speaks of her good faith and cites Italia Societa Anonima Di Navigazoine v. Cavalieri, 1959 D.C. Mun. App., 99 A.2d 488, requiring "good faith" and that the substantive rights of the other party are not prejudiced. To same effect, see Bush v. Bush, 61 App. D.C. 357, 63 F.2d 134. But appellant's failure to make payment of the trust payments, which failure would result in foreclosure, certainly could be the Court's determination of bad faith, and also such failure would prejudice the appellee by wiping out her ownership.

Answering the appellant's argument as to the merits, especially payments. The parties lived together until the arguments with the appellant forced the appellee to move, but she, the appellee, gave money to the appellant and depended upon the appellant to pay the appellee's bills (J.A. 6). There was nothing in the parties' residence together which would put the appellee on notice that her daughter was making an adverse claim in the property.

Appellant argues that during the hearing before the Court not one word concerning the appellant's fraud was developed. The answers to this are (1) that the liability question on a hearing after default is conceded and it is not required and (2) the Court on page 7 Joint Appendix stated he was not going into that because the parties were before him on a default.

All of the appellant's arguments ignore her failure to meet terms that were just, which resulted in the denial of her motion. Why should the appellant be permitted to have defaulted, then, after knowledge comes to her, she still defaults, and permits a condition which jeopardizes the entire subject matter, and for which she is given time to eliminate but fails, be permitted to be heard under these conditions?

With respect to points two and three argued in appellant's brief, a short answer to them is above set forth. However, it is well to point out that this argument permits the "tail to wag the dog." The assertions of fact, many of which are not in the record, and the others are directly contrary to the allegations of the verified complaint, or the testimony given before the Court.

CONCLUSION

We respectfully urge the Court to dismiss the appeal.

Respectfully submitted,

HERMAN MILLER

421 - 4th Street, N. W.
Washington, D. C.

J. FRANKLIN WILSON

1020 You Street, N.W.
Washington, D. C.

Attorneys for Appellee